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NO. 87-575

IN THE

Supreme Court of the United States

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

BRIEF OF THE DAILY PRESS, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following issues are raised in the questions presented in the petition:

1. Did the District Court properly grant the Daily Press' Motions for Summary Judgment in view of the plaintiffs' failure to put forth specific facts showing that a genuine issue of material fact remained for trial or an evidentiary hearing?

2. Did the District Court properly rule that plaintiffs had failed to file their civil actions within the requisite statute of limitations periods?

3. Did the District Court properly rule that the administrative tolling provision of 29 U.S.C. §626(e)(2) is inapplicable to these private civil actions?

4. Did the District Court properly reject Morse's attempted modification of the 180 day EEOC filing period through equitable estoppel?

5. Did the District Court properly rule that plaintiffs had failed to prove noncompliance by the Daily Press with the posting requirement of 28 U.S.C. §627?

6. Did the District Court properly rule that Sullivan's action was time-barred due to Sullivan's failure to file his EEOC charge within 180 days of first retaining counsel?

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BRIEF OF THE DAILY PRESS, INC IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of a decision of the United States Court of Appeals for the Fourth Circuit which affirmed the District Court's grants of summary judgment against the Petitioners in favor of Respondent The Daily Press, Inc. ("Daily Press"). Daily Press opposes the issuance of a writ of certiorari to review the decisions of the District Court and Court of Appeals because the decisions below were clearly correct and there is no conflict among the circuits or with this Court's decisions on any issue herein requiring resolution by this Court.

OPINIONS BELOW

The published opinion of the Fourth Circuit is now reported at 826 F.2d 1351 (4th Cir. 1987).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 626(e)(2). For the period during which the Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

STATEMENT OF THE CASE

The Decision of the District Court

On July 1, 1985, Richmond Sullivan (hereinafter referred to as "Sullivan") and Harold A. Morse ("Morse") filed separate actions against Daily Press. By order dated September 13, 1985, the cases were consolidated and both Sullivan and

Morse were granted leave to file Amended Complaints.

In their Amended Complaints, Sullivan and Morse alleged that they were discharged by the Daily Press in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). Both Sullivan and Morse point out that neither filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") within the requisite 180 days after the alleged discriminatory act. They allege that they did not acquire actual knowledge of their rights under the ADEA because of the Daily Press' failure to post the notice called for under 29 U.S.C. § 627, tailure to place the notice at a location of sufficient prominence, and/or failure to post a sufficient number of such

notices. Daily Press renewed its motions to dismiss/motions for summary judgment, asking the District Court to dismiss both Amended Complaints on two grounds: failure to comply with the 180 day EEOC filing requirement and failure to file the actions within the requisite statute of limitations periods.

By order of November 19, 1985, as well as two subsequent orders granting Morse and Sullivan extensions of time up through March 26, 1986, the District Court requested the parties to submit depositions, affidavits and briefs to support their respective contentions on the issue of equitable tolling. Oral Argument was held on July 12, 1986. By memorandum order dated July 17, 1986, the District Court sustained the Daily Press'

motions for summary judgment and dismissed both actions in their entirety.

The Decision of the Court of Appeals

On July 9, 1987, the Court of Appeals affirmed the judgments of the District Court. See 826 F.2d 1351 (4th Cir. 1987). No rehearing was requested and on October 7, 1987, plaintiffs applied for a writ of certiorari to this Court.

Background of the Case

Sullivan was discharged for cause by the Daily Press on June 7, 1982. The next day he executed a Virginia Employment Commission ("VEC") unemployment benefits form, listing his year of birth as 1939. Some time in the three month period between his discharge and September of 1982, Sullivan contacted an attorney named

W. Allen (Skip) Maust ("Maust") about the events surrounding his discharge from the Daily Press. Maust apparently did not advise Sullivan to file a charge with the EEOC. Maust did represent Sullivan at a VEC hearing on Sullivan's claim for unemployment benefits. Following that hearing, Sullivan discussed with Maust the possibility of pursuing a libel action against certain persons who testified at that VEC hearing. No such action was ever filed. Maust billed Sullivan for his services. Moreover, in October of 1982, Sullivan contacted another attorney from Hampton, Virginia, and also related to him the facts surrounding his discharge. No litigation was ever pursued.

Sullivan graduated from the University of Maryland with a degree in American Civilization. While in college he took several journalism courses which covered the basic journalism fundamentals and served as a reporter with the college newspaper. Prior to joining the Daily Press in 1975, Sullivan was employed in a variety of capacities, including a series of journalism-related or public relations positions. While employed with the Daily Press, he attended a two-week seminar sponsored by the American Press Institute which dealt with a number of journalism-type issues.

Sullivan testified in his deposition that discrimination against anyone at any level, whether it be age, race, or sex, is of journalistic

interest to a newsman. In particular, he notes that while employed at the Suffolk News Herald from approximately 1971 to 1975, he found discrimination and civil rights issues to be newsworthy, and, in fact, was considered to be a "liberal radical" for writing articles concerning blacks and for taking up various civil rights issues.

He acknowledges that during this tenure at the Daily Press, he was aware of the existence of minimum wage laws as well as prohibiting race and sex discrimination in employment. Likewise, Sullivan was aware that the newspaper was investigated by the EEOC for alleged race discrimination and had agreed to hire a certain number of blacks.

Sullivan contends that prior to June 7, 1982, he knew nothing about the ADEA and recalls no Daily Press newspaper articles dealing with age discrimination. However, in response to questions regarding an age/sex discrimination case brought against the College of William and Mary by a former basketball coach, Sullivan admitted the case would have been covered by the Daily Press in a fairly heavy fashion and that although he did not thoroughly read about it, he was familiar with the case.[1]

Joanne B. Keating ("Keating") has been continuously employed at the Daily Press as a secretary to the

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[1] See generally Jacobs v. College of William and Mary, 495 F. Supp. 183 and 571 F. Supp. 791 (E.D. Va. 1980), aff'd, 661 F.2d 922 (4th Cir. 1981).

Personnel Director since November 11, 1974. Her office is located between the Personnel Director's office and the office where employment applications and forms are filled out. This office is open at all times to the Daily Press employees and non-employees alike.

Keating states that there has always been a poster dealing with employment rights conspicuously displayed on the wall beside her desk.[2] There are no other documents

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[2]The employment rights poster that had been displayed since Keating came to work at the Daily Press was replaced in 1983 with another updated poster. This original poster was destroyed and no one can testify with certainty as to its precise contents. The new poster, which is displayed in the same manner as the earlier poster, is shown in photographs furnished by the Daily Press' Response to Plaintiff's Request

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or notices displayed on that particular wall. She testified that persons could freely walk up and read the notice since there was at least 3-4 feet between her desk and the wall where the poster was displayed. Keating had observed persons reading this poster. Although Keating read the original pre-1983 employment rights poster, she cannot with certainty state that it referenced the ADEA. She, however, assumed that it did.

Keating did state that while the EEOC was investigating the Daily Press in regard to the class action racial discrimination suit, during which time

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for Production of Documents and Answers to Plaintiff's Interrogatories which were filed on or about November 15, 1985.

EEOC personnel were frequently in and out of her office, she was unaware of any comments criticizing the employment rights notice posted there. Also, she was unaware of any instructions from the EEOC to post such notice elsewhere in the Daily Press buildings. She recalls that Sullivan frequently came into the office where the poster was displayed to talk with the Personnel Director. She identified the VEC Decision of the Appeals Examiner, dated September 29, 1982, and pointed out that Maust, Sullivan's attorney, was both present at the unemployment benefits hearing of September 2, 1982, and was forwarded a copy of the Appeals Examiner's final decision.

In an affidavit, Donald Blankenship ("Blankenship"), the

Personnel Director at the Daily Press from March 1, 1982 until January 14, 1985, corroborated Keating's testimony with regard to the display of the employment rights poster.

In response to the Daily Press' motions to dismiss, Sullivan and Maust each filed two affidavits which merely state that during the entire course of his employment at the Daily Press he never observed any posted notice informing them of their rights to be free from age discrimination.

On December 27, 1983, some 567 days after his discharge, Sullivan filed a charge with the EEOC. He was informed by the EEOC of his right to sue by letter dated December 18, 1984. Neither Sullivan nor Morse filed their instant civil actions until July 1, 1985.

Morse was discharged by the Daily Press on September 30, 1982. He did not actually file a charge with the EEOC and instead was merely listed on the charge of discrimination filed by Sullivan on December 27, 1983, some 452 days after his discharge.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court's discretionary review of decisions of the United States Court of Appeal by writ of certiorari is generally limited to cases where there is (1) a federal question has been decided in a way that conflicts with applicable decisions of this Court; (2) a conflict among the circuits on the same matter; or (3) an important issue of federal law is presented which has not been, but should be settled by this Court. Supreme Court Rule 17.1(a) and (c).

As more fully discussed hereinafter, the above reasons for granting certiorari are totally absent in the instant cases.

First, the decisions of the courts below are in full accord with previous decisions of this Court on summary judgment under Rule 56.

Second, there is no conflict among the circuits on an issue therein. It is uniformly held that an age discrimination action is time-barred for failure to file a charge of discrimination with the EEOC within the 180 day EEOC filing period or within the requisite 2 or 3 year statute of limitation period, as well as failure to produce sufficient evidence to create the genuine issue of material fact to establish grounds for equitable tolling or estoppel so

as to preclude summary judgment. It is well-established that the administrative tolling provisions of 29 U.S.C. §626 (e)(2) are inapplicable to private civil actions. Likewise, when faced with uncontradicted evidence of a properly posted employment rights notice a plaintiff cannot base his allegation of equitable tolling of the 180 day EEOC filing period upon his statement that he never observed such an employment rights notice. Moreover, an action is time-barred by failure to file an EEOC charge within 180 days after first retaining counsel. Plaintiffs' asserted conflict in decisions from the various circuits on each of these issues is illusory since every such alleged conflict can be reconciled on

factual grounds and distinguished from the instant litigation.

Finally, there is no important question of federal law which has not been, but should be settled by this Court. The Fourth Circuit affirmed the district court's decision based upon its finding that summary judgments were appropriate in these cases. Rule 56 specifically provides that a moving party is entitled to summary judgment when the non-moving party fails to show specific facts creating a genuine issue of material fact for trial. The decisions of the lower courts herein fully accorded with the provisions of Rule 56.

ARGUMENT

I. THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE ENTRY OF SUMMARY JUDGMENT WITHOUT A FULL EVIDENTIARY HEARING BECAUSE PLAINTIFFS FAILED TO PUT FORTH SPECIFIC FACTS SHOWING THAT A

GENUINE ISSUE OF MATERIAL FACT REMAINED FOR TRIAL OR EVIDENTIARY HEARING.

A.

Under Federal Rule of Civil Procedure 56(c) the party moving for summary judgment is responsible for identifying the bases for its motion by showing both the absence of genuine issue of material fact and that it is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). While conflicts in the evidence are resolved in the non-moving party's favor in reviewing the evidence, the court should also consider uncontroverted and unimpeached evidence unfavorable to that party. See e.g. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (summary judgment); Lovelace

v. Sherwin-Williams Co., 681 F.2d 230, 243 n. 14 (4th Cir. 1982) (J.N.O.V.).

To withstand a motion for summary judgment the non-moving party must do more than baldly assert the existence of some factual dispute. Over the Road Drivers, Inc. v. Transport Insurance Co., 637 F.2d 816, 818-820 (1st Cir. 1980). Instead, he must come forward with "specific facts showing that there is a genuine issue for trial." Rule 56(e). In order for an issue of fact to be genuine, non-moving parties such as Sullivan and Morse, "must do more than simply show that there was some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. ___, ___, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). Similarly, the mere existence of a scintilla of evidence in

support of the plaintiff's position, as well as evidence that is merely colorable or is not significantly probative, is insufficient to survive summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. ___, ___, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 212-217 (1986). The plaintiff must present evidence from which the jury could reasonably return a verdict in his favor. Id. As long as the plaintiff has been given an opportunity to conduct discovery, as have these plaintiffs who were given several extensions within which to submit their opposing evidence, this burden of putting forth evidence to defeat summary judgment remains upon the plaintiff even if the evidence deals with the defendant's state of mind or motive or is likely to be within the

exclusive possession of the defendant. Id.

Although the moving party has the initial responsibility, it is not required under Rule 56(c) to support its motion for summary judgment with affidavits or other similar materials negating the plaintiff's various claims. Celotex Corp. v. Catrett, 477 U.S. ___, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Nevertheless, in spite of the current state of summary judgment procedure after this Court's recent decisions in Matsushita Electric, Liberty Lobby and Celotex, plaintiffs would have the Court either ignore or reject these landmark rulings. Plaintiffs emphasize a line of earlier cases which hold that a non-moving party may resist a summary judgment

motion merely by pointing to his pleadings or by citing the movant's failure to produce any controverting evidence. For example, in Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980), the court, like the majority opinion of the D.C. Court of Appeals in Celotex, partially based its decision that summary judgment was inappropriate upon the fact that none of defendant's affidavits controverted the allegations of plaintiff's complaint.[3] As noted

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[3]Besides Wilkerson, plaintiffs also cite Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982), Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981), cert. denied, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983), Pirone v. Home Ins. Co., 507 F.Supp. 1281 (S.D. N.Y. 1981), aff'd, 742 F.2d 1430 (2nd Cir. 1983), and Earnhardt v. Com. of Puerto Rico, 691 F.2d 69 (1st Cir. 1982), as

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above, such is clearly not the law since the Celotex decision.

In Meiri v. Dacon, 759 F.2d 989 (2nd Cir.), cert denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985), the Second Circuit offered this guidance:

> The summary judgment rule would be rendered sterile however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the

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(Footnote Continued on Next Page) authorities calling for a full evidentiary hearing before summary judgment in any discrimination case. However, a close reading of these cases reveals that they are distinguishable on their facts. In Hrzenak, the plaintiff "consented" to the evidentiary hearing after which the district judge granted summary judgment against him. In Aronsen, in reversing the entry of summary judgment because a factual dispute still existed, the Ninth Circuit never actually ordered an evidentiary hearing upon remand and instead only called for further factual development. In Pirone, and Earnhardt, the former employees, unlike the plaintiffs here, presented sufficient evidence to create a factual conflict so as to preclude summary judgment.

> salutary purposes of summary judgment - avoiding protracted, expensive and harassing trials - apply no less to discrimination cases than to commercial or other areas of litigation. (citation omitted).

The Mieri court's reasoning certainly applies with equal force to plaintiffs' assertions here that summary judgment is inappropriate here since credibility of witnesses may be implicated in these discrimination cases. Under the Matsushita Electric, Liberty Lobby and Celotex trilogy of cases, credibility of witnesses should not become an issue unless the plaintiffs have first complied with the rigorous Rule 56 requirements of showing facts that create a genuine issue for trial. As with motive or intent, plaintiffs should not be allowed to defeat summary judgment by merely asserting either that

credibility may ultimately become an issue or that in discrimination cases plaintiffs are always entitled to a full evidentiary hearing at the summary judgment stage. To do so would virtually emasculate the effectiveness of Rule 56. Once Sullivan and Morse failed to meet their threshold standard of producing evidence to show a genuine factual dispute, summary judgment was proper and an evidentiary hearing or even full-blown trial totally unnecessary.

Moreover, when, as here, a suit is filed after the limitations period, the plaintiff has the burden to establish that the statute should be tolled. See, e.g., Sanders v. Duke University, 538 F.Supp. 1143, 1146 (M.D.N.C. 1982); Gibbs v. Pepsico, Inc., 25 F.E.P. Cases 661, 662 (E.D. Mich. 1981); Swietlowich

v. County of Bucks, 610 F.2d 1157 (3rd Cir. 1979). In seeking avoidance of the limitations period, all presumptions are against the plaintiff, Akron Presform Mold Co. v. McNeil Corp, 496 F.2d 230 (6th Cir.), cert. denied, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974).

Here, Sullivan and Morse both admitted this failure to comply with the ADEA time limitations. It is uncontroverted that neither complied with the 180 day filing period nor the 2 year statute of limitations. Sullivan also failed to meet the 3 year limitations period. Thus, the District Court properly entered summary judgment since, as discussed below in more detail in Sections C and D, Sullivan and Morse failed to point to any genuine issue of material fact that

would excuse the statute of limitations.

B.

Relying on Leite v. Kennecott Copper Corp., 558 F.Supp. 1170, 1173 n.1 (D. Mass), aff'd, 720 F.2d 658 (1st Cir. 1983) and Hovey v. Lutheran Medical Center, 516 F.Supp. 554, 556-557 (E.D.N.Y. 1981), the District Court held that the administrative tolling provisions of 29 U.S.C. § 626(e)(2) were not applicable to private civil actions such as the instant cases. Petition at 21a-22a. Accord Fulton v. NCR Corp., 472 F.Supp. 377, 382 (W.D.Va. 1979).[4] Each of

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[4]Although plaintiffs assigned error to this issue at the Court of Appeals stage, they fail to mention it in their petition. Under well-settled appellate principles, this aspect of

(Footnote Continued on Next Page)

these cases hold that individuals bringing private actions do not benefit from the tolling provided in § 626(e)(2) since that code section speaks only of conciliation by the EEOC and makes no mention of any conciliation efforts which may precede a private ADEA action brought under § 626(c) or § 626(d). Indeed, the legislative history makes it clear that the reference to "informal methods of conciliation, conference, and persuasion pursuant to subsection (b)" is directed solely to those EEOC

(Footnote Continued on Next Page) the District Court ruling will be assumed to be correct and should not be considered by this Court. See Supreme Court Rule 21.1(a); Matsushita Electric, 475 U.S. at ___, 106 S. Ct. at 1352 n.3, 89 L.Ed.2d at 548 n. 2b; Namet v. U.S., 373 U.S. 179, 190, 83 S.Ct. 1151, 1157, 10 L.Ed.2d 278, 286 (1963).

conciliation efforts required under § 626(b) before the EEOC initiates any legal action. See House Conf. Rep. No. 95-950, 95th Cong., 2nd Sess., reprinted in 1978 U.S. Code and Ad. News 528, 534.

The District Court properly construed §626(e)(2) in accordance with the legislative history and case law. Sullivan's claim accrued on June 7, 1982, and it was not until July 1, 1985, some 3 years and 25 days later, that he filed his lawsuit. He failed to file within either the 2 or 3 year statute and the District Court correctly found his action to be time-barred.[5] Morse's claim accrued on

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[5]For purposes of argument, even if Sullivan were entitled to tolling, he still failed to file his suit within

(Footnote Continued on Next Page)

September 30, 1982 and he did not file his action until July 1, 1985, over two and one half years later. Thus, he too failed to comply with the 2-year limitation period. Furthermore, Morse's action is untimely because he failed to offer any evidence to create a genuine factual issue on his claims of willful ADEA violations.

C.

Morse attempts to excuse his failure to comply with the 180 day filing requirement of §626(d)(1) by relying upon equitable estoppel.

(Footnote Continued on Next Page)
the 2 year period. E.g., Kazanzas v. Walt Disney, 704 F.2d 1527 (11th Cir.), cert. denied, 464 U.S. 982, 104 S.Ct. 425, 78 L.Ed.2d 360 (1983). Since Sullivan did not present sufficient evidence to support the willful ADEA allegations of his Complaint, his action would still be time-barred in its entirety.

However, under the estoppel doctrine, the genesis of the 180 day period is not affected by an employee's alleged lack of knowledge of the discriminatory effects of a particular decision. Felty v. Graves Humphrey Co, 785 F.2d 516, 519-520 (4th Cir. 1985). Instead, equitable estoppel focuses upon whether there has been affirmative misconduct by the employer which lulled the employee into delaying an ADEA filing, such as promise of reinstatement or conditioning his generous severance package upon not discussing the termination with others. See, e.g, Id.; Franci v. Avco Corp., 538 F. Supp. 250, 254 (D. Conn. 1982).

Conversely, unless the employee can present some specific facts showing that a genuine factual dispute exists, equitable estoppel is inapplicable and

summary judgment should be granted. Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 61 (2d Cir. 1986) and cases cited therein; English v. Pabst Brewing Co., 645 F. Supp. 186 (W.D.N.C. 1986), aff'd., 828 F.2d 1047, (4th Cir. 1987). "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed. 2d 196, 202 (1984).

Morse was discharged on September 30, 1982. He and Sullivan filed their joint EEOC charge on December 27, 1983, almost a year and three months later. While arguing for equitable estoppel, Morse has failed to point to any evidence to support the bald allegations of his Complaint that

the Daily Press engaged in activity that somehow misled him into delaying the filing of his ADEA claim. See, English v. Pabst Brewing Co, supra. Instead, he again asserts that the mere existence of a policy of reduction-in-force constitutes a misrepresentation of the reason behind his discharge.

The District Court properly rejected this contention by pointing out that most employers defend discrimination cases by offering nondiscriminatory justifications such as reductions-in-force. Also, it is instructive that courts have failed to hold that standing alone a similar reduction-in-force called for equitable estoppel. See, e.g., Felty, supra. Indeed, when compared with equitable estoppel cases, the facts presented in

the Morse case simply fail to constitute the egregious employer misconduct that warrants equitable estoppel. Accordingly, estoppel is inapplicable here since Morse has failed to prove that he was in any way induced by the Daily Press into failing to timely file his ADEA claim.

D.

Tolling of the 180 day period of § 626(d)(1) may be allowed due to that employer's failure to post the statutory notice required by 29 U.S.C. § 627 and 29 CFR §1627.10 (1981). See, e.g., Vance v. Whirlpool Corp., 716 F.2d 1010, 1013 (4th Cir. 1983).

In contrast, the instant litigation presents uncontradicted evidence in the form of the affidavits and deposition testimony of Keating along with the corroborating affidavit

of Blankenship stating that during their entire periods of employment at the Daily Press a poster setting forth the employment rights was continuously and conspicuously displayed on the wall in the personnel office; that no other documents were placed on that particular wall; that the view of the poster was unobstructed; and that Daily Press employees and the general public had free access to this poster. This is further established by the photographs submitted by the Daily Press which show how the existing poster and its predecessor were displayed.

In response to this specific evidence as to how the notice was posted and maintained, both Sullivan and Morse have submitted several affidavits which generally state that

they never observed any posted notice informing them of their rights. Both have failed to submit any other evidence which would in any way suggest that the Daily Press has not complied with the posting requirement or that the posting of a single notice was somehow inadequate. It is important that neither Sullivan nor Morse presented evidence that they or any other current or former Daily Press employee can testify from personal knowledge that they looked at the wall and that there was no such poster. Likewise, they have failed to present any evidence that the notice did not refer to the ADEA.

Courts have consistently held that where an employee makes a bare assertion that he did not see a properly posted notice, there will be

no tolling of the EEOC filing period.[6] When, as here, there is uncontradicted evidence that the employer posted an employment rights notice in a conspicuous place and without denying that fact the employee only states that he never saw such a notice, no genuine issue as to material fact exists. In

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[6] See Posey v. Skyline Corp., 702 F.2d 102 (7th Cir. 1983), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1984); Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982); Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984); Quina v. Owens-Corning Fiberglass Corp., 575 F.2d 1115 (5th Cir. 1978); Byers v. Follmer Trucking Co., 763 F.2d 599 (3rd Cir. 1985); Downie v. Electric Boat Division, 504 F. Supp. 1082 (D. Conn. 1980); Brudne v. Amalgamated Trust & Savings Bank, 627 F. Supp. 458 (N.D. Ill. 1986); Bomberger v. Consolidated Coal Co., 623 F. Supp. 89 (W.D. Pa. 1985); Butz v. Hertz Corp., 554 F.Supp. 1178 (W. D. Pa. 1983); Keitz v. Lever Bros. Co., 563 F.Supp. 230 (N.D. Ind. 1983); Gibbs v. Pepsico, Inc., supra; English v. Pabst Brewing Co, supra.

fact, at least one post-Anderson v. Liberty Lobby decision has held that this type of cursory response is insufficient to oppose a well-supported motion for summary judgment. See Giles v. Carlin, 641 F.Supp. 629, 635 (E.D. Mich. 1986).

Plaintiffs' elaborate arguments that the notice was not posted in a conspicuous place and that multiple notices must be posted throughout Daily Press' buildings are without merit. The District Court properly pointed out that no case has ever required multiple notices. Petition at 16a. The Court of Appeals emphasized that the statute and regulations refer only to "a notice." 826 F.2d at 1353. Also, single notices have repeatedly been held to be in compliance with the conspicuousness requirement of §627.

See Keitz, supra [outside personnel office], Butz, supra [above desk of city manager's secretary]; Hrzenak, supra [employee lunch room]; Posey, supra [employee lunch room], Byers, supra [trucking company terminal].

Indeed, it is interesting that in Bomberger, supra, the counterpart of Sullivan and Morse cited Aronsen, supra, for the proposition that whenever equitable tolling is in issue summary judgment is inappropriate. However, Aronsen was distinguished by the Bomberger court since Bomberger, like plaintiffs here, had simply not satisfied his initial summary judgment standard of producing sufficient facts for either the equitable tolling or estoppel issue.

Also, Sullivan and Morse never filed any affidavits or submitted any

other evidence creating any genuine issue of material fact supporting their conspicuousness argument. Rule 56(e). Moreover, as noted by the authorities cited above, the only duty imposed by the posting requirements is that the notice be conspicuously posted. Employers are not required to either prove that multiple notices were posted or that the employee in question was ever actually observed reading that notice. "If notice is properly posted and the employee does not see it or sees it, but is still not aware of his rights, there will normally be no tolling of the filing period." McClinton v. Alabama By-Products Corp., 743 F.2d 1483, 1486 (11th Cir. 1984).

II. THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT BECAUSE SULLIVAN'S ACTION WAS TIME-BARRED DUE TO HIS FAILURE TO

FILE HIS EEOC CHARGE WITHIN 180 DAYS OF FIRST RETAINING COUNSEL.

Where there is equitable tolling of the 180 day filing requirement, that time period expires within 180 days of the time the employee either retains an attorney or acquires actual knowledge of his rights under the ADEA. See e.g. Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 515 F.2d 1195, 1198 (5th Cir. 1975); Vance v. Whirlpool Corp, 716 F.2d at 1013.

The overwhelming majority of cases hold that equitable modification of the applicable EEOC limitations period is inappropriate when, as was the case with Sullivan, the employee has been represented by or has consulted counsel

within that EEOC filing period.[7] Likewise, even in cases that involve equitable tolling, that tolling ceases and the limitations period for filing with the EEOC begins to run when the

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[7] See, e.g., Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 525 F.2d at 1200 n. 8; Downie v. Electric Boat Division, 504 F.Supp. at 1086-1087; Sanders v. Duke University, 538 F. Supp. at 1146 n. 2; Keyse v. California Texas Oil Corp., 590 F.2d 45, 47-48 (2nd Cir. 1978); Welty v. S.F.&G., Inc., 605 F. Supp. 1548, 1560-1564 (M.D. Ala. 1985); Albano v. General Adjustment Bur., Inc., 478 F. Supp. 1209, 1215 (S.D.N.Y. 1979), aff'd, 622 F.2d 572 (2nd Cir. 1980); Needham v. Beecham, Inc., 515 F. Supp. 460, 467-468 (D.Me. 1981); Bennett v. Russ Berrie & Co., Inc., 564 F. Supp. 1576, 1580-1581 (N.D. Ind. 1983); Comfort v. Rensselaer Polytechnic Institute, 575 F. Supp. 258, 261 (N.D.N.Y. 1983); Cole v. CBS, Inc., 634 F. Supp. 1558, 1564 (S.D.N.Y. 1986); Sprott v. Avon Products, Inc., 596 F. Supp. 178; 182-183 (S.D.N.Y. 1984); Leite v. Kennecott Copper Corp., 558 F. Supp. at 1174.

employee simply retains or consults counsel following his discharge.[8]

The mere ignorance of legal rights does not toll a statute of limitations. See, e.g., Larson v. American Wheel and Brake, Inc., 610 F.2d 506, 510 (8th Cir. 1979); Wagner v. Sperry Univac, Div. of Sperry Rand Corp., 458 F. Supp. 505, 515 (E.D.Pa. 1978), aff'd, 624 F.2d 1092 (3rd Cir. 1980). Furthermore, a discharged employee like Sullivan cannot avoid responsibility for his noncompliance with EEOC filing deadlines by claiming ignorance of the law or complaining of the actions or omissions of his attorney. Edwards,

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[8] See, e.g., Vance, 716 F.2d at 1013; Smith v. American President Lines, LTD, 571 F.2d 102, 109-110 (2nd Cir. 1978); Otstott v. Verex Assur., Inc., 481 F.Supp. 1269, 1271 (M.D. Tex. 1980).

supra; Albano, supra; Downie, supra; Keyse, supra; Sprott, supra. Accord Hay v. Wells Cargo, Inc., 596 F. Supp. 635, 642 (D. Nev. 1984).

The principal authority relied upon by the Downie, Albano, and Hay courts is this Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). There, the plaintiff complained that the involuntary dismissal of his case under such circumstances unduly penalized him for the conduct of his counsel. In affirming that dismissal, the Supreme Court explained with the following language which is certainly responsive of Sullivan's argument regarding the harshness of this rule upon both employees and their attorneys:

> Petitioner voluntarily chose this attorney as his representative in

> the action, and he cannot now avoid consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." (citation omitted).

370 U.S. at 633-634, 82 S.Ct. at 1390, 8 L.Ed.2d at 740. Accord Davis v. United Fruit Company, 402 F.2d 328 (2nd Cir. 1968), cert. denied, 393 U.S. 1085, 89 S.Ct. 869, 21 L.Ed.2d 778 (1969). Similarly, in the ADEA case of Jacobson v. Pitman-Moore, Inc., 624 F.Supp. 937, 942-3 (D. Minn. 1985), aff'd, 786 F.2d 1172 (8th Cir. 1986), the court acknowledged that even if its ruling may lead to a legal malpractice claim against the plaintiff's attorney, it must be the plaintiff, not her former employer, who ultimately bears

responsibility for the deficiencies of the attorney of her choice.

The District Court correctly noted that Sullivan totally ignores the "or retains an attorney" language of Vance, when he contends that constructive knowledge of his ADEA rights should not be imputed to him because he only consulted the two attorneys for unemployment compensation and libel issues. Petition at 19a-20a. Likewise, in Downie v. Electric Boat, supra, the court squarely rejected the employee's argument that following his discharge the attorneys had merely focused on securing the employee's health benefits, not a possible ADEA claim. To the same effect is Edwards, supra, where tolling of the 180 day deadline was denied when the discharged employee had also consulted two

attorneys, one of which was within the 180 day period. In explaining its ruling, the Fifth Circuit offered this cogent observation:

> While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Edwards, 515 F.2d 1200 n. 8.

While contending that a split of authority exists, the sole authorities cited on petition in support of Sullivan's contention that the courts below erred in imputing constructive knowledge of the ADEA to him through his attorneys are the cases of Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984) and Dartt v. Shell Oil Co., 539 F.2d

1256 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977), reh. denied, 434 U.S. 1043, 98 S.Ct. 600, 54 L.Ed.2d 792 (1978). Petition at 22.

In Meyer, the court allowed equitable estoppel even though the plaintiff had consulted and retained an attorney within several weeks after his discharge. The Third Circuit distinguished the majority line of cases by pointing out that unlike those cases the plaintiff was not arguing for equitable tolling due to his ignorance of the law, but equitable estoppel due to certain misrepresentations by the employer, which Sullivan has been unable to prove here. In Dartt, the plaintiff's initial contact with an attorney was only "... a preliminary approach to a possible consultation..."

538 F.2d at 1261. The Dartt decision has been held to be of questionable precedential value by several courts for a number of reasons.[9] For one thing, the affirmance by an evenly divided U.S. Supreme Court prevents that Dartt from becoming a binding national precedent. Furthermore, Sullivan's retention of an attorney within less than 3 months after his termination certainly cannot be deemed the mere "preliminary approach [to attorney] as to possible consultation" found in Dartt. Keyse, 590 F.2d at 47-48 n. 2.

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[9] See, Keyse, 590 F.2d at 47-48 [tolling denied where pro se appellant was represented by counsel within EEOC filing period and relied upon that attorney's misinformation]; Sprott, 596 F.2d at 183 [tolling denied where plaintiff relies upon erroneous advice of counsel].

Clearly, the Meyer and Dartt cases are based upon factors which are not present here and completely ignore the overwhelming majority of cases on the attorney consultation/tolling issue. First, Sullivan consulted and retained an attorney as early as September 2, 1981, less than 3 months after his discharge. In addition, he contacted still another unnamed attorney in October of 1982 about possible further claims. Both attorney contacts were well within the initial 180 days immediately following Sullivan's discharge. Second, Sullivan lacked diligence in pursuing his claims since he waited over one year after first consulting counsel and some 567 days after discharge before filing his EEOC charge. Third, the Daily Press was clearly prejudiced by Sullivan's delay

in filing his EEOC charge inasmuch as the Daily Press was not promptly notified of this discrimination claim and, as a result, will be hindered in that it will not be possible to resolve Sullivan's dispute upon fresh recollections. See, e.g., Greene v. Whirlpool Corp., 708 F.2d 128, 130 (4th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 1707, 79 L.Ed.2d 171 (1984).

Indeed, it is inconceivable on these facts that Sullivan was not aware of his rights under the ADEA even before his discharge from the Daily Press. This is especially true if one were to believe the events surrounding his discharge that Sullivan sets forth in his petition at pages 3-4. Sullivan testified that he had developed a reputation for covering civil rights

issues while employed with the Suffolk newspaper and that discrimination of any type be it age, sex or race, was of a special interest to a newsman. He also testified that during this tenure at the Daily Press he was familiar with a newsworthy age discrimination case which was heavily covered in that area by the Daily Press; that he was aware of the existence of minimum wage laws and laws prohibiting sex and race discrimination in employment; and that he knew that the Daily Press was under investigation by the EEOC. It stretches credibility to believe that a veteran newsman who has such extensive knowledge of civil rights, discrimination, and employment-related issues knew nothing about the ADEA.

Furthermore, a discharged employee who has the means of acquiring actual

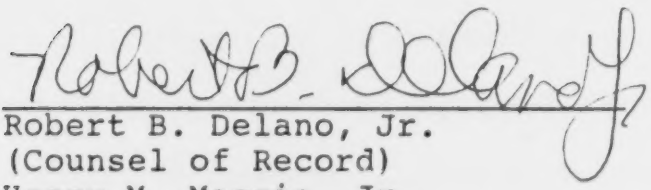
or constructive knowledge of his ADEA rights should not be allowed to obtain equitable tolling merely by complaining of his employer's failure to fully comply with the posting requirements of § 627. Templeton v. Western Union Telegraph Co., 607 F.2d 89, 91 (5th Cir. 1979).

Therefore, since Sullivan failed to file his charge with the EEOC within 180 days of first retaining an attorney or acquiring actual knowledge of his rights under the ADEA and since he retained that attorney well within the 180 day period following his discharge, the District Court properly rejected Sullivan's request for equitable tolling of the 180 day limitations period.

CONCLUSION

For all of the foregoing reasons and authorities, the Court of Appeals correctly concluded that the district court's granting of defendants' motions for summary judgment was appropriate. The petition for writ of certiorari, therefore, should be denied.

Respectfully submitted,



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